AMER RECORDS AND BRIEFS

No. 03-____

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IN THE

# Supreme Court of the United States

BANK AUSTRIA AG, ET AL.,
*Petitioners,*

*v.*

JOHN L. SNIADO, III, ET AL.,
*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In the decision below, the Second Circuit construed the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a, to authorize U.S. antitrust claims based on transactions conducted entirely in foreign countries. That decision conflicts with the Fifth Circuit's decision in *Den Norske Stats Oljeselskap AS* v. *HeereMac vof*, 241 F.3d 420 (2001), *cert. denied sub nom. Statoil ASA* v. *HeereMac v.o.f.*, 534 U.S. 1127 (2002), but is consistent with the D.C. Circuit's decision in *Empagran S.A.* v. *F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, *cert. granted*, No. 03-724 (Dec. 15, 2003). This Court has granted certiorari to review the D.C. Circuit's decision in *Empagran*.

As in *Empagran*, the question presented is as follows:

Whether plaintiffs may pursue Sherman Act claims seeking recovery for injuries sustained in transactions occurring entirely outside U.S. commerce.

## PARTIES TO THE PROCEEDING

Petitioners, who were defendants and appellees below, are Bank Austria AG, Raiffeisen Zentralbank Österreich AG, Erste Bank Der Österreichisechen Sparkassen AG, Raiffeisen Landesbank Niederösterreich-Wien AG, Niederösterreichische Landesbank-Hypothekenbank AG, Österreichische Volksbanken AG, ABN Amro Bank N.V., GWK Bank N.V., Fortis N.V., ING Bank N.V., Banca di Roma SpA, Banca Nazionale del Lavoro SpA, Banca Intesa, SpA, Deutsche Bank AG, and Unicredito Italiano SpA.

Respondents are John L. Sniado, III, who was plaintiff and appellant below, and Österreichische Postsparkasse, who was a defendant and appellee below. Sniado brought the complaint as a purported class action on behalf of all others similarly situated, but no class has been certified. Österreichische Postsparkasse is a respondent under Supreme Court Rule 12(6).

## CORPORATE DISCLOSURE STATEMENT

Bank Austria AG (n/k/a Bank Austria Creditanstalt AG) is a subsidiary of Bayerische Hypo-und Vereinsbank AG. No other publicly-held corporation owns 10% or more of Bank Austria AG's (n/k/a Bank Austria Creditanstalt AG) stock.

Raiffeisen Zentralbank Österreich AG is a subsidiary of R-Landesbanken-Beteiligung GmbH, which in turn is a subsidiary of Raiffeisen-Landesbanken-Holding GmbH. No other publicly-held corporation owns 10% or more of Raiffeisen Zentralbank Österreich AG's stock.

Erste Bank Der Österreichisechen Sparkassen AG has no parent corporations, and no publicly-held corporation owns 10% or more of Erste Bank Der Österreichisechen Sparkassen AG's stock.

Raiffeisen Landesbank Niederösterreich-Wien AG is a subsidiary of Raiffeisen-Holding Niederösterreich-Wien reg. GenmbH. No other publicly-held corporation owns 10% or more of Raiffeisen Landesbank Niederösterreich-Wien AG's stock.

Niederösterreichische Landesbank-Hypothekenbank AG is jointly controlled by Österreichische Volksbanken AG and the Province of Lower Austria. No publicly-held corporation owns 10% or more of Niederösterreichische Landesbank-Hypothekenbank AG's stock.

Österreichische Volksbanken AG is controlled by Volksbanken Holding reg.GenmbH. 25% plus one share are owned by DZ Bank AG, Germany, and 10% of the shares are are owned by ERGO/Victoria-Group, which in turn is owned by Muenchener Rueck, a publicly-traded German corporation

ABN Amro Bank, N.V. is a subsidiary of ABN Amro Holding N.V. No other publicly-held corporation owns 10% or more of ABN Amro Bank, N.V.'s stock.

GWK Bank N.V. is a subsidiary of Fortis N.V. and Fortis SA/NV. No other publicly-held corporation owns 10% or more of GWK Bank N.V.'s stock.

Fortis N.V. has no parent corporations, and no publicly-held corporation owns 10% or more of Fortis N.V.'s stock.

ING Bank N.V. is a subsidiary of ING Groep N.V. No other publicly-held corporation owns 10% or more of ING Bank N.V.'s stock.

Banca di Roma SpA is a subsidiary of Capitalia SpA. No other publicly-held corporation owns 10% or more of Banca di Roma SpA's stock.

Banca Nazionale del Lavora SpA has no parent corporations. Banco Bilbao Vizcaya Argentaria, S.A. is the only publicly-held corporation that owns 10% or more of Banca Nazionale del Lavora SpA's stock.

Banca Intesa, SpA has no parent corporations. Credit Agricole S.A. is the only publicly-held corporation that owns 10% or more of Banca Intesa, SpA's stock.

Deutsche Bank AG has no parent corporations. No publicly-held corporation owns 10% or more of Deutsche Bank AG's stock.

Unicredito Italiano SpA has no parent corporations, and no publicly-held corporation that owns 10% or more of Unicredito Italiano SpA's stock.

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI

Petitioners Bank Austria AG, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. 1a-8a) is not yet published, but is available at 2003 WL 22753144. The opinion of the district court (App. 9a-27a) is reported at 174 F. Supp. 2d 159.

## JURISDICTION

The judgment of the court of appeals was entered on November 21, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

The Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), Pub. L. No. 97-290, Title IV, 96 Stat. 1233, 1246 (codified as amended at 15 U.S.C. § 6a) provides:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

## STATEMENT

This action under Section 1 of the Sherman Act rests on the proposition that the antitrust laws of the United States provide a remedy for an individual who was allegedly injured when he exchanged one European currency for another at a European bank in Europe, and who suffered no injury in commerce either within the United States or between the United States and any other country. The court

of appeals ruled that a plaintiff may bring an antitrust action in a U.S. court against foreign defendants to redress alleged injuries suffered abroad that arose entirely out of foreign commerce (and that were unrelated to any effect the foreign conduct might have had on U.S. commerce), and remanded to the district court to determine respondent's standing to bring suit. The court of appeals reasoned that jurisdiction was proper, even if respondent's injuries arose wholly in European commerce, so long as *someone* (but not respondent) suffered injury by reason of the conduct's effect on United States commerce.

The court of appeals' decision opens the U.S. courts to waves of antitrust suits, including class actions, brought by plaintiffs who themselves can allege only injuries from transactions conducted wholly in foreign markets. If this case is an indicator of the antitrust actions to come, many of those suits are likely to be based on alleged antitrust violations the effects of which are felt overwhelmingly in foreign markets, and with U.S. effects that are tangential at most. This result is untenable as a matter of law, policy, and common sense. This Court has already granted review in another case presenting the same legal issue: *F. Hoffmann-La Roche Ltd.* v. *Empagran, S.A.*, No. 03-724 (cert. granted Dec. 15, 2003). The Court should therefore hold this petition pending its decision in *Empagran*. After the Court decides *Empagran*, it should grant this petition, vacate the judgment of the court of appeals, and remand this case to the Second Circuit for further proceedings in accordance with that decision.

### A. Statutory Background

Section 1 of the Sherman Act prohibits restraints of trade or commerce within the United States and between the United States and foreign nations. 15 U.S.C. § 1. The Sherman Act does not, however, reach restraints of trade that take place entirely among foreign nations. A restraint of trade intended to have and having substantial effects in U.S. commerce may bring about liability under the U.S. an-

titrust laws, but a restraint of trade in purely foreign commerce cannot.

Judge Learned Hand explicated this critical distinction in *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*"), where he set forth the "effects test" for federal jurisdiction over claims under Section 1 of the Sherman Act: United States courts have jurisdiction only when the intended and reasonably foreseeable effects of the alleged antitrust violations are felt within the borders of the United States. *Id.* at 443. Judge Hand wisely cautioned against any broader construction of the reach of Section 1 of the Sherman Act, because "almost any limitation of the supply of goods in Europe, for example, . . . may have repercussions in the United States if there is trade between the two" and "when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them." *Id.*

Congress enacted the FTAIA in part to codify the *Alcoa* "effects test" and to resolve conflicting applications of that test that had arisen over the years. *See* H.R. Rep. No. 97-686, at 5 (1982). In particular, Congress addressed the sharply diverging interpretations of the Department of Justice, which took the position that the antitrust laws only apply to foreign conduct with a direct, substantial, and foreseeable effect on U.S. commerce, and some courts that had ruled that anything more than a *de minimis* effect on U.S. commerce would suffice to establish jurisdiction. *Id.* Congress adopted the Department of Justice interpretation, thus limiting the kinds of antitrust claims over which U.S. courts would have jurisdiction. *Id* at 6.

The text of the FTAIA reflects Congress's intent to limit antitrust liability for conduct affecting foreign commerce. The FTAIA provides that Section 1 of the Sherman Act "shall not apply" to "trade or commerce . . . with foreign nations unless" certain conditions are satisfied. 15 U.S.C. § 6a. First, echoing the Justice Department's interpretation of the *Alcoa* effects test, the FTAIA limited the reach of the Sherman Act to conduct that "has a direct, substantial, and

reasonably foreseeable effect" on U.S. commerce. 15 U.S.C. § 6a(1). Second, Congress specified that the Sherman Act does not apply unless that "direct, substantial, and reasonably foreseeable effect" on U.S. commerce itself "gives rise to a [Sherman Act] claim." 15 U.S.C. § 6a(2). Through the latter condition, Congress required that "the 'effect' providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws." H.R. Rep. No. 97-686, at 12. The FTAIA's text and legislative history thus contain "no hint of a statutory purpose to permit recovery where the situs of the injury is entirely foreign and the injury exclusively arises from a conspiracy's effect on foreign commerce." *See* Brief of the U.S. and FTC as Amici Curiae in Support of Petition for Rehearing En Banc at 9, *Empagran S.A.* v. *F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338 (D.C. Cir.), *cert. granted*, No. 03-274 (Dec. 15, 2003) ("U.S. Amicus Br.").

### B. Procedural History

#### 1. Proceedings in the district court

On November 30, 2000, respondent filed this case in district court as a purported class action under Section 1 of the Sherman Act. Respondent alleged that he paid "supracompetitive fees" to petitioners (collectively, "the European Banks") when exchanging one European currency for another European currency. App. 10a. His counsel admitted at oral argument that respondent's transactions occurred solely in Europe. *Id.*[1] Petitioners moved to dismiss the action on the ground, among others, that respondent's alleged injury, as set forth in the complaint, did not arise out of the alleged violation's effects on U.S. commerce. Respondent sought discovery to determine whether the alleged conspiracy at issue in fact had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, as the FTAIA requires. App. 13a. The district court correctly denied this

[1] Since no class had yet been certified, the district court, in accordance with this Court's precedent, *see Baxter* v. *Palmigiano*, 425 U.S. 308, 310-311, n.1 (1976), treated the claim as an individual action by respondent and evaluated the sufficiency of the complaint's allegations on that basis. App. 14a.

request for discovery, because petitioners were challenging the legal sufficiency of the complaint, assuming the truth of its factual allegations. App. 13a.

The district court dismissed the complaint. App. 27a. It held that, to clear the hurdle of the FTAIA, a plaintiff's own claim under Section 1 of the Sherman Act must arise by reason of the conduct's alleged effect on U.S. commerce. *Id.* The district court then found that respondent "does not, and apparently cannot, allege that his claim arose out of any effect on domestic American commerce." *Id.* The court rejected respondent's argument that it could entertain his Sherman Act claim merely because the effect of the European Banks' alleged conduct could theoretically give rise to *a* claim in U.S. commerce—even if not respondent's own claim—as against "[t]he weight of authority." App. 20a-21a (citing, *inter alia*, *Empagran S.A.* v. *F. Hoffman-La Roche, Ltd.*, No. Civ. 001686TFH, 2001 WL 761360 (D.D.C. June 7, 2001)). The district court also suggested that respondent lacked standing to bring his suit because his injury arose entirely from the effects of the alleged conspiracies on European commerce. App. 17a, 25a. Respondent appealed.

### 2. The *Kruman* decision

While this case was pending on appeal, the Second Circuit decided *Kruman* v. *Christie's International PLC*, 284 F.3d 384 (2002).[2] In that case, plaintiffs who sold or purchased items through auctions held overseas alleged that the auction houses conducting those auctions had engaged in a price-fixing conspiracy that also affected commerce in the United States. *Id.* at 391. The plaintiffs' claims, however, did not arise from those effects on U.S. commerce. The Second Circuit held, nonetheless, that the plaintiffs could proceed with their claims. The Second Circuit read the FTAIA to provide that federal courts have jurisdiction over Section 1 claims involving foreign commerce whenever the alleged

[2] The *Kruman* defendants filed a petition for certiorari in this Court, but the case settled and the petition was dismissed. *Christie's Int'l PLC* v. *Kruman*, 124 S. Ct. 27 (2003).

conduct's anticompetitive effect on U.S. commerce could give rise to *any* Sherman Act claim, whether or not it gives rise to the *plaintiff's* own claims. *Id.* at 399. In other words, the Second Circuit held that defendants may be held liable in class action suits for all antitrust injuries arising anywhere in the world so long as the plaintiff alleges that the illegal conduct harmed *someone* in U.S. commerce.

The Second Circuit's decision created a conflict with an opinion of the Fifth Circuit, *Den Norske Stats Oljeselskap AS* v. *HeereMac vof*, 241 F.3d 420 (2001) ("*HeereMac*"), *cert. denied sub nom. Statoil ASA* v. *HeereMac v.o.f.*, 534 U.S. 1127 (2002). There, the Fifth Circuit ordered dismissal of a Norwegian plaintiff's claim that it overpaid for barge services on the North Sea as a result of a price-fixing conspiracy that also affected U.S. commerce. *Id.* at 422. The Fifth Circuit held that, in light of the FTAIA, the Norwegian plaintiff had no recourse in U.S. courts under U.S. antitrust law because its claim did not arise by reason of the effects of the price-fixing conspiracy on U.S. commerce. *Id.* at 427.

### 3. Proceedings in the Second Circuit

Relying squarely on its decision in *Kruman*, the Second Circuit reversed the district court's dismissal of respondent's complaint here. App. 6a-7a. The Second Circuit held, as in *Kruman*, that the "'plain meaning' of the statute precluded the construction of [the FTAIA] advanced by the [European Banks] and adopted by the district court in this case." App. 6a. The Second Circuit remanded the case to the district court to determine (a) whether the alleged conspiracy about which respondent complains had "direct, substantial, and reasonably foreseeable effect[s]" on U.S. commerce as required by the FTAIA, 15 U.S.C. § 6a(1), and (b) whether respondent had standing to assert a Sherman Act claim. App. 6a, 8a.

## C. The *Empagran* Case

Less than a month after the Second Circuit's decision in this case, this Court granted certiorari to review the D.C. Circuit decision in *Empagran S.A.* v. *F. Hoffman-LaRoche*,

*Ltd.*, 315 F.3d 338, *cert. granted*, No. 03-274 (Dec. 15, 2003). In that case, the D.C. Circuit, like the Second Circuit in *Kruman*, held that a plaintiff may bring suit to recover for injuries arising from foreign commerce when "the conduct's harmful effect on the United States ... give[s] rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." *Id.* at 341. The D.C. Circuit noted the split between the Second and Fifth Circuits on that very issue. *Id.* at 346-348. The question presented by the petition in *Empagran* is precisely the one presented here: "[w]hether plaintiffs may pursue Sherman Act claims seeking recovery for injuries sustained in transactions occurring entirely outside U.S. commerce." 03-274 Pet. for Cert. i.

## REASONS FOR GRANTING THE PETITION

The question presented by this petition is the same as the question that this Court will decide in *Empagran*: whether a plaintiff may pursue a claim in a U.S. court under Section 1 of the Sherman Act based on alleged injuries that were sustained in purely foreign commerce, on the ground that the defendants' conduct might have given rise to an effect on U.S. commerce that injured *someone else*.[3] Because the Court will decide in *Empagran* whether the FTAIA or standing requirements bar plaintiffs from proceeding under the Sherman Act in such circumstances, the Court should hold this petition pending its decision in *Empagran*. After the Court issues that decision, it should grant this petition, vacate the judgment of the court of appeals, and remand this case to the Second Circuit for further proceedings in light of that decision.

There are two interrelated reasons why respondent may not seek recovery for the injuries he alleges. First, under the FTAIA, a plaintiff (such as respondent) may not pursue a claim under Section 1 of the Sherman Act to re-

[3] This case differs somewhat from *Empagran* in that petitioners here contest whether the alleged conspiracy produced substantial effects in the United States. This difference is irrelevant if this Court reverses the D.C. Circuit in *Empagran*, but could become relevant if it affirms.

dress an injury sustained as a result of an alleged antitrust violation's effects on foreign—rather than U.S.—commerce. Second, respondent lacks standing to pursue recovery for injuries arising strictly from alleged effects on European commerce. Although these two points implicate separate legal doctrines, and although the Second Circuit did not itself resolve the question of respondent's standing (but rather remanded that issue to the district court), the Court's decision in *Empagran* is likely to provide guidance on both the standing and FTAIA issues. Both issues are encompassed by the question presented by the petition in *Empagran*, and the text of that petition clearly raises both issues. *See* 03-274 Pet. for Cert. 13-14 (FTAIA), 20-21 (antitrust standing and antitrust injury). Accordingly, this petition should be held for the Court's decision in *Empagran*.

## I. A Plaintiff May Not Pursue A Sherman Act Claim Based On An Alleged Injury Arising From The Effects On Foreign Commerce

It is a deeply embedded principle in antitrust jurisprudence that "American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Corp.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 (1986). The Second Circuit nonetheless ruled in this case that a plaintiff may pursue a claim under Section 1 of the Sherman Act even when that plaintiff's alleged injury arose out of effects felt only in Europe from transactions that took place entirely within Europe. In reaching that conclusion, the Second Circuit relied on its incorrect construction of the FTAIA in the *Kruman* decision. The petitioners in *Empagran* have explained at length why that construction and the D.C. Circuit's similar construction in *Empagran* are contrary to both the text and the legislative history of the FTAIA. 03-274 Pet. for Cert 12-21. The plain language of the FTAIA limits the reach of antitrust law to claims seeking to remedy injuries resulting from effects on U.S. commerce (*id.* at 13-15); the FTAIA contains no language expressing an intent to enlarge the extraterritorial application of the Sherman Act to encompass injuries arising from

purely foreign transactions (*id.* at 15); the historical context in which the FTAIA was enacted confirms that its purpose was to restrict, not expand, antitrust jurisdiction (*id.* at 15-17); and the legislative history of the FTAIA and sound antitrust policy counsel against the interpretation of the FTAIA adopted by the D.C. and Second Circuits (*id.* at 17-20).

In their *amici curiae* brief supporting rehearing in the D.C. Circuit in *Empagran*, the United States and the Federal Trade Commission warned that the holding in *Empagran* would "burden the federal courts in the United States with suits seeking to recover for injuries sustained abroad and arising exclusively from foreign conduct and foreign anticompetitive effects." U.S. Amicus Br. at 13. This case graphically illustrates these concerns. Respondent seeks to recover for alleged injuries from exchanges of *European* currencies at *European* banks in *Europe*. He bases his allegations on a European Union investigation into alleged conspiracies to fix rates for exchanging European currencies (App. 3a-4a), but he has failed to allege that the European Union's investigation found any evidence that the conspiracies were intended to or did have any effects in the United States. In fact, beyond his boilerplate conclusion that petitioners' conduct caused "direct, substantial and reasonably foreseeable" effects on U.S. commerce, respondent alleges nothing establishing that the alleged conspiracies had any effects in the United States. Indeed, although he brought this case as a putative class action, respondent has been unable (despite multiple opportunities to amend his complaint) to add a named plaintiff who claims injury by reason of currency exchanges in the United States. App. 12a-13a. Petitioners, moreover, know of no other actions seeking recovery for injuries suffered in U.S. commerce as a result of the alleged antitrust violations about which respondent complains.

As the *Empagran* petitioners have also pointed out, allowing cases alleging injuries suffered as a result of anticompetitive effects on foreign commerce "to be transported from around the globe to this country[] not only compounds the burdens they impose on litigants and the U.S. judicial

system but also infringes the sovereign prerogatives of foreign nations." 03-274 Pet. for Cert. 24. *See also* Brief of the Federal Republic of Germany as Amicus Curiae in Support of Petition for a Writ of Certiorari, *F. Hoffmann-LaRoche, Ltd.* v. *Empagran, S.A.*, No. 03-724 (U.S. Dec. 1, 2003) at 7 ("F.R.G. Amicus Br."). The European Union and its Member States (among other foreign jurisdictions) have been aggressively prosecuting illegal cartels and levying large fines for violations of their own antitrust laws, in part by offering leniency to those who self-report violations. F.R.G. Amicus Br. 14-16. If the decisions here and in *Empagran* are upheld, antitrust violators determining whether to participate in foreign nations' leniency programs will have to consider the potentially massive exposure they will face in U.S. courts for transactions having nothing to do with the United States. *Id.* at 15. Consequently, opening U.S. courthouses to claims for antitrust injuries suffered in foreign commerce not only would infringe on the sovereignty of foreign nations but would also threaten to undermine their efforts to enforce their antitrust laws by discouraging wrongdoers from participating in leniency programs. Impeding foreign nations' antitrust enforcement programs would directly harm U.S. interests because those programs play a vital role in cooperative efforts between the United States and other nations to deter and prosecute multinational cartels and other antitrust violations. *See* Brief of the Chamber of Commerce of the United States as Amicus Curiae in Support of Petition for a Writ of Certiorari, *F. Hoffmann-LaRoche, Ltd.* v. *Empagran, S.A.*, No. 03-724 (U.S. Nov. 26, 2003) at 16-17.

Expansion of U.S. antitrust enforcement authority in the past has led to frictions between the United States and its allies. In fact, many foreign nations, including Canada and the United Kingdom, have enacted legislation intended to block enforcement of United States judgments for treble damages. *See* ABA Section of Antitrust Law, *Antitrust Law Developments* 1208 (5th ed. 2002). By dramatically expanding the extraterritorial reach of the U.S. antitrust laws, the Second and D.C. Circuits' interpretation of the FTAIA promises to create new frictions between the United States

and other countries over international antitrust policy and impede efforts to promote cooperation in antitrust enforcement. *See generally* F.R.G. Amicus Br. 11-16.

## II. RESPONDENT LACKS STANDING TO SEEK DAMAGES FOR INJURIES IN FOREIGN COMMERCE

This case also raises another issue that is before the Court in *Empagran*: whether purchasers who have been injured only in foreign commerce by alleged anticompetitive conduct have standing to pursue damages for their foreign injuries in U.S. courts.[4] As the petitioners in *Empagran* have pointed out, the D.C. Circuit's decision turned "the FTAIA into a silent partial repeal of the basic standing principles laid down by this Court in *Brunswick* [*Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)], for the benefit of foreign plaintiffs." 03-274 Pet. for Cert. 21.

This Court's articulation of the factors governing antitrust standing in *Associated General Contractors of California* v. *California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"), makes clear that the antitrust laws do not confer standing on a plaintiff, such as respondent, who has suffered injuries arising only in foreign commerce. Those factors include (1) the nature of a plaintiff's injury, and whether it is of a type that the Sherman Act was intended to address, *id.* at 538-539, (2) whether the complexity of the plaintiff's antitrust claim will render a trial judicially unmanageable, *id.* at 543-545, and (3) whether there exists an alternative, effective "private attorney general," *id.* at 541-542. These factors all point to a conclusion that plaintiffs with injuries arising in foreign commerce lack antitrust standing.

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[4] As we have noted above (pp. 8-9), although the Second Circuit did not resolve the issue of respondent's standing, that issue is related to the question whether the FTAIA bars respondent's suit. Both the FTAIA and standing issues are before the Court in *Empagran*. This Court's decision in *Empagran* may well resolve the standing issue in a way that would make a remand to the district court in this case on that question unnecessary or would narrow the scope of the issues on remand.

First, as is clear from its plain language, Congress did not intend the Sherman Act to reach transactions in foreign commerce. *See* 15 U.S.C. § 1 (prohibiting restraints of trade in U.S. commerce and between U.S. and foreign nations, but not between foreign nations); *see also Turicentro, S.A.* v. *American Airlines Inc.*, 303 F.3d 293, 307 (3d Cir. 2002). Judge Hand held as much in *Alcoa*. 148 F.2d at 443. And the FTAIA was "not intend[ed] to alter existing concepts of antitrust injury or antitrust standing." H.R. Rep. No. 97-686 at 11.

Second, permitting plaintiffs whose injuries arise in foreign markets to sue under U.S. antitrust laws would "not only burden[] the courts, but also undermine[] the effectiveness of treble-damages suits." *AGC*, 459 U.S. at 545. Discovery would be particularly burdensome since the witnesses and evidence would be located outside the United States, raising complex issues under the Hague Evidence Convention[5] and substantial issues of international comity. Courts would also have to perform the difficult task of ascertaining whether defendants have adequate presence in the United States to assert personal jurisdiction. Assessing damages would be exceptionally difficult because U.S. courts would have to evaluate economic effects on foreign markets, many of which do not have available the same empirical data found in the United States. Assessing the effects of antitrust violations on (for example) Russian commerce would undoubtedly "require additional long and complicated proceedings involving massive evidence and complicated theories." *Id.* at 544 (internal punctuation and citation omitted).

Third, there is no reason to fear that denying standing to a plaintiff whose injuries arise *only* from effects on foreign commerce will encourage price fixing that violates U.S. law. If a price-fixing conspiracy in fact affects U.S. commerce, then there will be an identifiable class of persons who may bring suit: those plaintiffs whose injuries arise out of

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[5] Hague Convention for the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. 7444, 847 U.N.T.S. 231 (1969).

the conspiracy's effect on U.S. commerce. "The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general." *AGC*, 459 U.S. at 542.

Under these three factors, respondent clearly lacks standing to pursue a Section 1 claim. Respondent has alleged that his injuries stem from exchanging European currencies at European banks in Europe. First, as discussed above, the Sherman Act was not intended to reach such transactions (and the FTAIA did not expand its reach). Second, if respondent's suit were to go forward, the courts would have to determine the effects of an alleged price-fixing conspiracy on markets in Austria, Germany, and Italy, among others, placing undue burden on the district court. Third, if any individual or entity has been injured in United States commerce as the result of the alleged price-fixing conspiracy, that person would be the proper party to bring suit.

## CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *F. Hoffmann-La Roche Ltd.* v. *Empagran, S.A.*, No. 03-724 (cert. granted Dec. 15, 2003), and then the judgment of the court of appeals should be vacated and remanded to the Second Circuit for further proceedings in accordance with the Court's opinion in that case.

Respectfully submitted,

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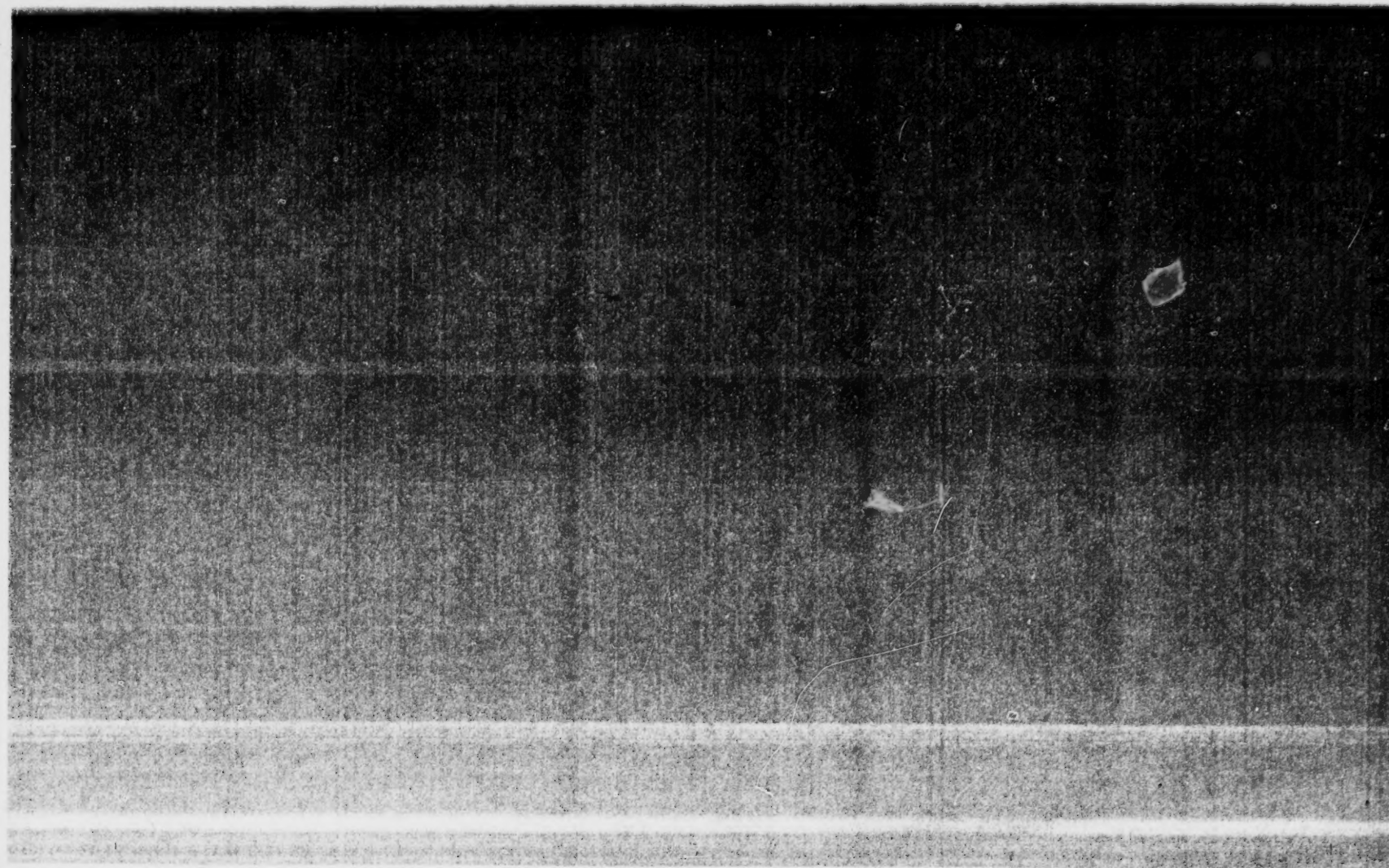
JANUARY 2004

# APPENDICES



## APPENDIX A

United States Court of Appeals
for the Second Circuit

John L. SNIADO, III, on behalf of himself and all others similarly situated, Plaintiff-Appellant,

v.

BANK AUSTRIA AG, Raiffeisen Zentralbank Österreich AG, Erste Bank Der Österreichisechen Sparkassen AG, Österreichische Postsparkasse, Raiffeisenlandes-Bank Northern Austria-Vienna, Northern Austria Landesbank Hypothekenbank, Österreichische Volksbanken AG, ABN Amro Bank N.V., GWK Bank N.V., Fortis N.V., ING Bank N.V., Banca di Roma SpA, Banca Nazionale del la Voro SpA, Banca Intesta, Deutsche Bank AG, Unicredito Italiano SpA, Defendants-Appellees.

BANK FÜR ARBEIT UND WIRTHSCHAFT AG, Sanpaolo IMI SpA, Defendants.

No. 02-7012

Nov. 21, 2003

[2003 WL 22753144]

Before: McLAUGHLIN, CABRANES, and SACK, Circuit Judges.

McLAUGHLIN, Circuit J.

[*1] Appellant John L. Sniado, III appeals from a decision of the United States District Court for the Southern District of New York (Schwartz, J.) dismissing his putative class action pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction under § 6a(2) of the Foreign Trade Antitrust Improvements Act ("FTAIA"). *See* 15 U.S.C. § 6a. In dismissing under § 6a(2), the district court assumed arguendo that Sniado satisfied the jurisdictional requirements of § 6a(1) and stated *sua sponte* that, even if

Sniado had satisfied the jurisdictional requirements of the FTAIA, he would lack standing to prosecute this antitrust claim.

We vacate the district court's dismissal under § 6a(2) and remand for the court to determine whether Sniado satisfies the jurisdictional requirements of § 6a(1) and has standing. We also grant Sniado leave to file a motion to obtain permission from the district court to replead pursuant to Fed. R. Civ. P. 15(a).

## BACKGROUND

During the 1980s, plaintiff-appellant John L. Sniado, III, a resident of New York, regularly traveled to Europe, where he exchanged American dollars for Euro-currencies at various European banks.

In April 1997, Gerhard Praschak, the head of Kontrollbank in Austria, committed suicide. He confessed, in a suicide note, that Austria's banking system was rife with price-fixing of exchange rate fees for Euro-currencies.

In September 1999, the European Commission ("Commission") issued "statements of objection" to eight Austrian banks, seven of which are defendants-appellees in this action. In these statements, the Commission said it had evidence that the defendants-appellees fixed currency exchange fees. The Commission conducted a wide-scale antitrust investigation that potentially implicated over 120 European banks in Austria, Belgium, France, Germany, Holland, Ireland, Italy, Portugal, and Spain.

Having discovered that he was a victim of this alleged European antitrust conspiracy, Sniado filed a putative class action on behalf of all persons and businesses in the United States who had paid foreign exchange fees at "supra- competitive" rates. *See Sniado v. Bank Austria AG*, 174 F. Supp. 2d. 165 (S.D.N.Y.2001) (Schwartz, J.). He alleged violations of the Sherman Act, 15 U.S.C. § 1, and the Clayton Act, 15 U.S.C. § 15.

The defendants are European banks, most of which are alleged to have offices in the United States. The Austrian banks include Bank Austria AG, Erste Bank der Österreichisechen Sparkassen AG, Raiffeisen Zentralbank Österreich AG, Bank für Arbeit und Wirtschaft AG, Österreichische Postsparkasse, Raiffeisenlandesbank Northern Austria-Vienna, Northern Austria Landesbank-Hypothekenbank, and Österreichische Volksbanken AG. The Dutch banks include ABN AMRO Bank, N.V., ING Bank N.V., GWK Bank N.V., and Fortis N.V. The Italian Banks include Banca Intesta, Banca di Roma SpA, Banca Nazionale del Lavoro SpA, UniCredito Italiano SpA, and Sanpaolo IMI SpA. The solitary German bank is Deutsche Bank AG.

[*2] Sniado claims that, while in Europe, he paid what he called supra- competitive foreign exchange fees to defendants, and he now seeks to recover his financial losses. He also alleges that the defendants have "exchanged millions of dollars of European currency in the United States and in Europe" for supra-competitive fees.

In the district court, certain defendants moved under Fed. R. Civ. P. 12(b)(1) to dismiss for lack of subject matter jurisdiction pursuant to the FTAIA, and under Fed. R. Civ. P. 12(b)(6) to dismiss for failure to state a claim. Sniado expressed his intention to amend his complaint and, in the meantime, the defendants before the court agreed to withdraw their motion to dismiss without prejudice.

After Sniado filed his amended complaint, the defendants refiled their motion to dismiss. They were joined, in this motion, by additional defendants who had subsequently been served with the amended complaint. Certain defendants also moved to dismiss for lack of personal jurisdiction. However, the court postponed briefing on personal jurisdiction until the issue of subject matter jurisdiction was resolved. Sniado opposed the motion to dismiss for lack of subject matter jurisdiction and sought leave to conduct discovery relating to subject matter jurisdiction.

After oral argument on the motion to dismiss, Sniado asked Judge Schwartz to defer ruling on subject matter jurisdiction until this Court passed on *Kruman v. Christie's Int'l PLC*, 129 F. Supp. 2d 620 (S.D.N.Y.2001)--which was on appeal at the time--and until the United States Supreme Court decided whether to grant certiorari on a Fifth Circuit case, *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001). Both cases addressed the same issue decided by the district court below: whether, under § 6a(2) of the FTAIA, defendants' conduct must give rise to "a" claim, generally, or to "the" specific antitrust claim of the plaintiff.

Because defendants presented a facial challenge to Sniado's amended complaint, the court denied Sniado's discovery motion. The district court also denied Sniado's motion for a stay and dismissed his complaint.

To establish jurisdiction under the FTAIA, a plaintiff must satisfy the requirements of both § § 6a(1) and 6a(2). Failure to plead either one is fatal to jurisdiction. In accordance with "the weight of authority," including notably *Kruman*, 129 F. Supp. 2d 620 (S.D.N.Y.2001), the district court construed § 6a*(2)* of the FTAIA to preclude subject matter jurisdiction over Sniado's claim. (The court willingly assumed, without deciding, that Sniado would have satisfied the jurisdictional requirements of § 6a*(1)* ). Although the issue was not raised by the defendants, the court also suggested that Sniado would lack standing to prosecute this antitrust action.

Thereafter, the Supreme Court denied *certiorari* in *Den Norske*. *See* 534 U.S. 1127 (2002). Subsequently, we reviewed *Kruman*, the district court decision upon which Judge Schwartz relied. *See* 284 F.3d 384 (2d Cir. 2002).

[*3] Sniado now appeals.

## DISCUSSION

We review *de novo* the district court's conclusion that Sniado's amended complaint does not, on its face, allege sub-

ject matter jurisdiction under the FTAIA. *See Kruman*, 284 F.3d at 390.

The FTAIA provides that:

> Sections 1 to 7 of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect--
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. § 6a.

The two FTAIA issues on appeal are: (1) whether, under subdivision 1, *supra*, the defendants' alleged conduct has a "direct, substantial, and reasonably foreseeable" effect on domestic commerce; and (2) whether, under subdivision 2, *supra*, "such effect gives rise to a claim." In the interest of simplicity and organizational convenience, we address these issues in reverse order.

I. *Section 6a(2)*

In the district court, the parties disagreed on the proper scope of § 6a(2), which requires that the effect of the banks' conduct on domestic commerce "give rise[ ] to *a* claim" under the relevant antitrust provisions. *See* 15 U.S.C. § 6a(2) (emphasis added). Despite use of the generic term "a claim," the banks argued that plaintiff must allege that their conduct

gave rise to *his* claim. The district court agreed based on *Kruman v. Christie's Int'l PLC*, 129 F. Supp. 2d 620 (S.D.N.Y.2001), and authority in other circuits. *See Sniado v. Bank Austria AG*, 174 F. Supp. 2d at 166 (citing cases).

After Judge Schwartz's decision in this case, however, we decided *Kruman*, and held that the "plain meaning" of the statute precluded the construction of § 6a(2) advanced by the defendants and adopted by the district court in this case. *See* 284 F.3d at 400 ("[A]dopting the defendants' interpretation would mean rewriting the statute to replace the word 'a' . . . with the words 'the plaintiff's,' resulting in a new subsection 2 that requires that the 'effect give[ ] rise to *the plaintiff's* claim." (emphasis in original)).

Accordingly, we vacate the district court's dismissal of Sniado's complaint under § 6a(2).

II. *Section 6a(1)*

In their appellate brief, the defendants concede that *Kruman*--the current law of this Circuit--controverts their position on § 6a(2). They respond that we should still affirm the district court's decision because Sniado failed to allege that the banks' anticompetitive conduct had "a direct, substantial, and reasonably foreseeable effect" on domestic commerce under § 6a(1). The district court dismissed Sniado's complaint under § 6a(2), and therefore assumed, without deciding, that Sniado would satisfy the requirements of § 6a(1). *See* 174 F. Supp. 2d at 165-66. Because we vacate on the § 6a(2) issue, we remand for the district court to decide in the first instance whether Sniado's complaint complies with § 6a(1).

**[*4]** In relation to § 6a(1), the district court speculated on two alternative interpretations of "conduct" under the FTAIA: "narrow" and "broad." *See* 174 F. Supp. 2d at 164-66. Under the narrow interpretation, the "conduct" at issue here would be "the charging of supra-competitive fees in Europe" (the acts that harmed Sniado). *Id.* at 164. The district court suggested that, under this standard, "dismissal

for lack of subject matter jurisdiction would be required." *Id.* at 165.

Under the broad interpretation, on the other hand, the conduct in question would be "the entire alleged conspiracy to fix fees for exchanges of European currencies in Europe and the United States." *Id.* Under this standard, the court indicated that Sniado "would have alleged conduct that directly and reasonably foreseeably affected domestic commerce." *Id.* After noting that the parties failed to address whether the effect, if any, was "substantial," the court assumed that substantiality was adequately alleged. *Id.* at 166.

In *Kruman*, we explained that "conduct" refers to "acts that are illegal under the Sherman Act," not to the specific acts that caused the plaintiff injury. *See* 284 F.3d at 398-99 ("[T]he 'conduct' in this case was not the imposition of high prices pursuant to an illicit agreement, but the alleged agreement by the defendants to fix prices in foreign auction markets."). The narrow interpretation of "conduct" would be inconsistent with our holding in *Kruman*. Therefore, on remand, the district court should apply the broad interpretation of "conduct" under § 6a(1).

III. *Standing*

The district court intimated *sua sponte* and in *dicta* that, even if jurisdiction were established, Sniado would lack standing. *See* 174 F. Supp. 2d at 165. On appeal, the defendants argue that lack of standing provides yet another basis to affirm dismissal of Sniado's complaint. For the reasons stated below, we remand for the district court to decide the standing issue in the first instance.

The appellees are correct that we are entitled to affirm the judgment on any ground with support in the record, even one raised for the first time on appeal. *See, e.g., Adirondack Transit Lines, Inc. v. United Transp. Union*, 305 F.3d 82, 88 (2d Cir. 2002). A federal appellate court has "discretion to consider" antitrust standing in the first instance as "prudence dictates." *See Thomas v. Network Solutions Inc.*, 176 F.3d 500, 509-10 (D.C. Cir. 1999); *see also Pinney*

*Dock & Transp. Co. v. Penn. Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir. 1988). In *Kruman*, however, we reversed a dismissal of the plaintiff's complaint under § 6a(2) of the FTAIA and remanded the issue of standing for the district court to decide in the first instance. *See* 284 F.3d at 403. Because, in this case, we are remanding for the district court to determine whether Sniado alleges jurisdiction under § 6a(1), we exercise our discretion to remand the standing issue as well.

IV. *Leave to File Motion to Replead*

[*5] In light of *Kruman*, we also grant Sniado permission to file a motion seeking to replead pursuant to Fed. R. Civ. P. 15(a). We express no view, however, that would require the district court to grant such a motion. Therefore, on remand, the court may decide the issues on the basis of Sniado's amended complaint or a second amended complaint, as it deems appropriate.

## CONCLUSION

For the foregoing reasons, we vacate the district court's decision and remand for further proceedings consistent with this opinion.

## APPENDIX B

United States District Court
for the Southern District of New York

John L. SNIADO, III, on behalf of himself and all others similarly situated, Plaintiff,

v.

BANK AUSTRIA AG, Raiffeisen Zentralbank Österreich AG, Erste Bank Der Österreichisechen Sparkassen AG, Bank Für Arbeit Und Wirtschaft AG, Österreichische Postsparkasse, Raiffeisenlandesbank Northern Austria-Vienna, Northern Austria Landesbank-Hypothekenbank, Österreichische Volksbanken AG, ABN AMRO Bank N.V., GWK Bank N.V., Fortis N.V., ING Bank N.V., Banca Di Roma SpA, Banca Nazionale Del Lavoro SpA, Banca Intesa, Deutsche Bank AG, and Unicredito Italiano SpA, Defendants.

No. 00 Civ. 9123(AGS)

Nov. 30, 2001

[174 F. Supp. 2d 159]

### *MEMORANDUM ORDER*

SCHWARTZ, District Judge.

In this antitrust action, plaintiff alleges that defendants conspired to fix the fees charged for exchanging one European currency for another European currency. Plaintiff seeks to represent a class of American individuals and businesses who paid supra-competitive fees for exchanging currencies that make up the Euro. Defendants move to dismiss the amended complaint for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1), and for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6). Defendants also contend in their motions that plaintiff's claims are partially time-barred. For the reasons set forth below, defendants' motions to dismiss the action for lack of subject

matter jurisdiction are granted; the Court does not reach the other issues.

## I. BACKGROUND

Plaintiff John L. Sniado, III is an individual who lives in New York State. (Amended Class Action Complaint for Violation of Federal Antitrust Laws ("Am. Compl.") ¶ 5.) He "paid foreign exchange fees to defendants when exchanging certain of the currencies that make up the Euro during the relevant period and has been damaged . . . by paying supra-competitive fees for such transactions." (*Id.*) No further information about Mr. Sniado's transaction or transactions is provided. During proceedings in this action on April 5, 2001, however, plaintiff's counsel represented to the Court that Mr. Sniado had exchanged currency in Europe but not in the United States.

The defendants are European banks, some of whom are alleged to have offices in the United States. (Am. Compl. ¶¶ 6-22.) Defendants Bank Austria AG ("Bank Austria"), Erste Bank der Österreichisechen Sparkassen AG ("Erste Bank"), Raiffeisen Zentralbank Österreich AG ("Raiffeisen"), Bank für Arbeit und Wirtschaft AG and Österreichische Postsparkasse (together "BAWAG"), Raiffeisenlandesbank Northern Austria-Vienna ("Raiffeisenlandesbank"), Northern Austria Landesbank-Hypothekenbank ("Northern Austria Landesbank"), and Österreichische Volksbanken AG ("Österreichische") are all Austrian banks. (*Id.* ¶¶ 6-12.) Defendants ABN AMRO Bank, N.V. ("ABN Amro"), ING Bank N.V. ("ING"), GWK Bank N.V. ("GWK") and Fortis N.V. ("Fortis") are all Dutch banks. (*Id.* ¶¶ 13-16.) Defendants Banca Intesa SpA ("BI"), Banca di Roma SpA ("BDR"), Banca Nazionale del Lavoro SpA ("BNL"), UniCredito Italiano SpA ("Unicredito"), and Sanpaolo IMI SpA ("Sanpaolo") are all Italian banks. (*Id.* **[*161]** ¶¶ 17-21.) Defendant Deutsche Bank Aktiengesellschaft ("Deutsche Bank") is a German bank. (*Id.* ¶ 22.) Collectively, defendants have "exchanged millions of dollars of European cur-

rency in the United States and in Europe" in exchange for certain fees. (*Id.* ¶ 33.)

In April 1997, the head of an Austrian bank not named in this action committed suicide. His suicide note asserted that the Austrian banks, known collectively as the "Lombard Club," had engaged in price fixing and other illegal activities. (*Id.* ¶¶ 39-40.) The next month, Austrian journalists reported that Austrian banks had discussed certain measures to improve their profitability. (*Id.* ¶ 41.) The suicide note and the media story led to an investigation by the European Commission (the "EC"), which raided several of the Austrian banks and seized documents. (*Id.* ¶¶ 42-43.) The EC subsequently accused the Austrian banks of fixing exchange fees for currencies that make up the Euro. According to the EC, the Lombard Club had been meeting for decades to discuss setting currency exchange fees. (*Id.* ¶¶ 44-47.) In September 1999, the EC sent "statements of objections" (a/k/a "warnings") to eight Austrian banks, including the seven Austrian defendants here. The warnings allegedly contained documentary evidence of the fixing of currency exchange fees. (*Id.* ¶ 48.) In November 2000, the EC issued supplementary warnings to the members of the Lombard Club. (*Id.* ¶ 62.)

In February 1999, the EC raided certain banks in Germany, France, Spain, and Italy based on evidence that large European banks had been fixing currency exchange fees. Among the banks raided was defendant Deutsche Bank. (*Id.* ¶ 50.) In October 1999, the EC raided certain banks in Ireland, Belgium, and the Netherlands. Among the banks raided were defendants ABN AMRO, Fortis, GWK, and a subsidiary of defendant ING. (*Id.* ¶ 51.) The EC also issued over 250 letters demanding information regarding the fixing of currency exchange fees. (*Id.* ¶ 52.) In June 2000, EC officials stated that they had uncovered evidence of price-fixing among European banks. That same month, the EC disclosed that approximately 120 banks in Ireland, Portugal, Finland, and Belgium were under investigation for fixing currency exchange fees and had been issued warnings regarding such

conduct. The EC claims to have documentary evidence that certain banks, including ABN AMRO branches in Belgium and Portugal and the Deutsche Bank branch in Belgium, fixed currency exchange fees. (*Id.* ¶¶ 57-58.) In July 2000, the EC publicly stated that it had enough evidence to demonstrate that the 120 banks in Ireland, Portugal, Finland, and Belgium had violated European Union rules concerning competition. (*Id.* ¶ 59.) In August 2000, the EC issued warnings to seventeen German banks, thirteen Dutch banks, and two Dutch banking associations. The warnings stated that the EC had evidence of currency exchange fee fixing, in violation of European Union competition rules. Defendants Fortis, GWK, ABN AMRO and ING were among those receiving warnings. (*Id.* ¶ 61.) In November 2000, the EC held closed hearings concerning Finnish, Irish, Portugese, and Belgian banks. (*Id.* ¶ 69.) In April 2001, the EC ended its investigation of Dutch bank SNS Bank (which is not named in this action) after SNS Bank agreed to abolish its minimum foreign currency exchange fee. (*Id.* ¶ 71.)

In April 1999, Italy's central bank, the Bank of Italy, began to investigate a group known as "The Friends of the Bank Group," which included certain Italian banks and Deutsche Bank. The group allegedly met from March 1997 through January [*162] 1999 and agreed to fix currency exchange fees, among other things. (*Id.* ¶ 64.) In January 2000, the Bank of Italy fined thirteen banks a total of 33,000,000,000 Italian Lira (equaling approximately $17,250,000). According to the Bank of Italy, the banks had operated an illegal cartel since 1988 and had jointly set currency exchange fees. The fined banks had allegedly raised 1,000,000,000,000 Italian Lira over the previous ten years through their various unlawful activities. Among the banks fined were defendants Deutsche Bank, BDR, BNL, Sanpaolo, and Unicredito, and the predecessors of defendant BI. (*Id.* ¶¶ 66-68.)

Plaintiff filed this action on November 30, 2000. In March 2001, certain defendants moved to dismiss the complaint. During proceedings before the Court on April 5,

2001, plaintiff announced his desire to amend the complaint. With the consent of the parties in attendance (not all defendants having been served by that time), the motion to dismiss was withdrawn without prejudice, plaintiff was granted leave to file an amended complaint, and a schedule was set for a motion to dismiss the amended complaint. *See* Order dated April 5, 2001. Plaintiff filed his amended complaint in April 2001. The defendants that had been served then jointly moved to dismiss the amended complaint. Subsequently, those defendants who were later served also filed motions to dismiss, which motions adopted the arguments of the earlier joint motion. In addition to opposing the motions to dismiss, plaintiff filed a motion seeking leave to conduct discovery relating to subject matter jurisdiction. The Court denied that motion, concluding that defendants' motions make a facial, not factual, challenge to the amended complaint.[1] *See* Memorandum Order dated July 18, 2001, 2001 WL 812236. Briefing of the motions to dismiss was completed in August 2001.[2] The Court heard oral argument on October 11, 2001.

## II. MOTION TO DISMISS STANDARD

A court may not dismiss a complaint pursuant to Rule 12 unless, even when the complaint is liberally construed, it appears beyond doubt that the plaintiff can prove no set of facts which would entitle it to relief. *Jaghory v. New York State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir. 1997). On a motion to dismiss, a court must accept as true all of the facts alleged in the complaint. *Id.* A court must also

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[1] As these motions have been determined to make a facial challenge to the amended complaint, material outside the amended complaint, specifically the Affidavit of Bernard Persky in Opposition to Defendants' Joint Motion to Dismiss dated July 13, 2001, is hereby excluded from consideration.

[2] Briefing was completed as to the motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim. Certain defendants also moved to dismiss for lack of personal jurisdiction; the Court granted those defendants permission to postpone briefing of that issue until after resolution of the other issues.

must draw all reasonable inferences in the light most favorable to the plaintiff. *Id.* In antitrust cases, as in other types of cases, all that is required is a "short plain statement of a claim for relief which gives notice to the opposing party." *Global Disc. Travel Servs. v. Trans World Airlines*, 960 F. Supp. 701 (S.D.N.Y.1997) (Sotomayor, J.). "This does not mean that 'conclusory allegations which merely recite the litany of antitrust . . . will suffice.'" *Id.* (quoting *John's Insulation, Inc. v. Siska Constr. Co.*, 774 F. Supp. 156, 163 (S.D.N.Y.1991)).

Although plaintiff Sniado purports to represent a class of plaintiffs, the action is not now treated as a class action because **[*163]** no class has yet been certified. *See In re Painewebber Limited P'ships Litig.*, 147 F.3d 132, 137 (2d Cir. 1998) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 310-11 n. 1, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976); *Board of Sch. Comm'rs v. Jacobs*, 420 U.S. 128, 129-30, 95 S. Ct. 848, 43 L. Ed. 2d 74 (1975)). Until and unless a class is certified, the Court must treat this action as an individual action by plaintiff Sniado.

## III. DISCUSSION

The initial question here is whether the Court has subject matter jurisdiction over plaintiff's claim pursuant to the Foreign Trade Antitrust Improvements Act of 1982 (the "FTAIA"), 15 U.S.C. § 6a. The answer is no.

The FTAIA provides that:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless-
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect-
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. § 6a. The parties appear to agree that neither import nor export commerce are at issue here. Accordingly, the FTAIA issues presented are: (1) whether the alleged conduct by defendants has a "direct, substantial, and reasonably foreseeable" effect on domestic American commerce and (2) whether such effect is anticompetitive and gives rise to plaintiff's claim.

A. Section 6a(1)

With regard to the first question, defendants contend that plaintiff has not alleged any direct, substantial, or reasonably foreseeable effect on domestic American commerce. (Defs.' Joint Mem. of Law in Supp. of their Mot. to Dismiss the Am. Class Action Compl. Pursuant to Rules 12(b)(1) and 12(b)(6) of the Fed. R. Civ. P. ("Defs.' Mem.") at 10-12; Defs.' Joint Mem. of Law in Reply to Pl.'s Opp. to Defs.' Mot to Dismiss ("Reply Mem.") at 2-10.) Plaintiff asserts that he alleges just such an effect. (Pl.'s Mem. of Law in Opp. to Defs.' Joint Mot. to Dismiss ("Pl.'s Mem.") at 11-23.) Plaintiff does allege that he was damaged by "defendants' conduct in violation of the federal antitrust law[s] as complained of herein which had a direct, substantial, and reasonably foreseeable effect on United States commerce by raising exchange fees to plaintiff . . . ." (Am. Compl. ¶ 26.) However, this is merely a conclusory recitation of the antitrust litany and, accordingly, is insufficient.

In terms of facts, plaintiff does allege that defendants exchange currency "in the United States and Europe and received fees [for such exchanges] . . . ." (Am. Compl. ¶ 33.) Plaintiff also alleges that "defendants conspired, contracted or combined with themselves and others for the purpose and with the effect of raising, fixing, and stabilizing the fees paid by plaintiff . . . for [his] exchanges of European currency." (*Id.* ¶ 36.) Plaintiff does not specifically allege that the defendants agreed to fix currency exchange fees for **[*164]** transactions conducted in the United States. However, on a motion to dismiss, the Court will draw the reasonable inference that the allegedly conspiring defendants agreed to fix currency exchange fees in the United States as well as in Europe.

Drawing such an inference might or might not satisfy the direct and reasonably foreseeable requirements, however. In *Kruman v. Christie's International PLC*, 129 F. Supp. 2d 620 (S.D.N.Y.2001), the court noted that the word "conduct" in the FTAIA could be read broadly or narrowly. *Kruman* arose out of allegations that Sotheby's and Christie's, the world's two largest auctioneers of fine arts and antiques, conspired to fix prices. *Id.* at 622-23. The plaintiffs, four of whom were American, each purchased or sold items at auctions conducted by the defendants outside of the United States. Each plaintiff allegedly paid fixed, supra-competitive buyers' premiums or sellers' commissions at those foreign auctions. *Id.* at 623. The court dismissed the action for lack of subject matter jurisdiction under the FTAIA. In considering the FTAIA, the court noted that "conduct" could refer to "the totality of defendants' actions" or to the specific actions that harmed the plaintiffs. *Id.* at 625. The court concluded that the narrow interpretation was correct. *Id.* at 625-26. That interpretation meant that the "conduct" in question was the charging of supra-competitive premiums or commissions at auctions conducted outside of the United States. Accordingly, the court found no direct, substantial, and reasonably foreseeable effect on domestic commerce as a result of the defendants' alleged conduct. *Id.* If the Court were to adopt the *Kruman* interpretation of

"conduct," plaintiff would fail to satisfy § 6a(1). Under *Kruman*, the conduct at issue here would be the charging of supra-competitive fees in Europe, as that is the particular conduct that harmed Mr. Sniado. The charging of supra-competitive fees for exchanges of European currencies in Europe does not have a direct, substantial, or reasonably foreseeable effect on domestic commerce in the United States.

Plaintiff argues that a direct effect on United States commerce requires only that Americans overpay for services abroad. (Pl.'s Mem. at 13-17.) Plaintiff bases this argument upon *Caribbean Broadcasting Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080 (C.A.D.C.1998), and *Galavan Supplements Ltd. v. Archer Daniels Midland Co.*, C 97-3259 FMS, 1997 WL 732498, 1997 U.S. Dist. LEXIS, 18585 (N.D.Cal. Nov. 18, 1997). In *Caribbean Broadcasting*, the plaintiff owned a radio station in "the Eastern Caribbean, which includes Puerto Rico and the Virgin Islands." 148 F.3d at 1082. The defendants were the owner of a competing radio station and a telecommunications company. *Id.* The plaintiff alleged that the defendants had taken various actions that restrained the market for radio advertising, including conspiring to make the defendant radio station a monopoly in the Eastern Caribbean. *Id.* The court found that the plaintiff alleged a direct, substantial and reasonably foreseeable effect upon domestic commerce. The court noted that the plaintiff alleged "that there is a significant market for the sale of English-language radio advertising in the Eastern Caribbean, which includes Puerto Rico and the U.S. Virgin Islands. [The plaintiff] also allege[d] ... that many companies based in the United States are customers, and that [the defendant] and [the plaintiff] are competing sellers, in that market." *Id.* at 1086. To the extent that the finding of a direct effect arises from a market including American territory, *Caribbean Broadcasting* is distinguishable from this case. To the extent that *Caribbean Broadcasting* relies upon the fact that United States [*165] customers were engaging in transactions abroad, that decision conflicts with a decision from this District, *McElderry v. Ca-*

*thay Pacific Airways, Ltd.*, 678 F. Supp. 1071 (S.D.N.Y.1988). McElderry alleged that Cathay Pacific had conspired with other airlines to adopt excessive baggage charges on flights entirely outside the United States. The court found that there was no subject matter jurisdiction under the FTAIA because there was no direct, substantial, and reasonably foreseeable effect on United States commerce. As the Court stated:

> First, even accepting, for the purposes of this motion to dismiss, McElderry's contention that thousands of American passengers have been overcharged for their baggage by Cathay Pacific, an allegation of mere monetary injury is not enough to state a Sherman Act claim: a Sherman Act plaintiff must show injury to a market or to competition in general, not merely injury to individuals.

678 F. Supp. at 1078; *see also* H.R. Rep. No 97-686, at 9-10 (foreign transaction does not fall within American antitrust law solely because of American ownership of transacting parties). To the extent that *McElderry* and *Caribbean Broadcasting* conflict, the former presents the better argument for purposes of this action.

As for *Galavan*, that case declines to follow an earlier case from this District, *Eurim-Pharm v. Pfizer, Inc.*, 593 F. Supp. 1102 (S.D.N.Y.1984). In *Eurim-Pharm*, plaintiffs admitted that the defendants' conduct did not have a direct, substantial, and reasonably foreseeable effect on import or export commerce, but maintained that the defendants' conduct had a "spillover effect" on domestic commerce. *Id.* at 1106. The Court, apparently relying upon the text of § 6a, held that the plaintiffs had failed to establish subject matter jurisdiction. *Id.* at 1106-07. *Galavan* attempts to distinguish *Eurim-Pharm* on the basis that the *Galavan* plaintiffs had alleged an effect on imports. 1997 WL 732498, 1997 U.S. Dist. LEXIS 18585, at *7. The *Galavan* Court then relied upon legislative history to find that spillover effects were sufficient. *Id.* 1997 WL 732498, at *8. To the extent *Galavan* is distinguishable from *Eurim-Pharm* based on an alle-

gation of effects on import commerce, *Galavan* is also distinguishable from the instant action. To the extent *Galavan* relies upon legislative history, *Eurim-Pharm's* reliance on statutory text is more persuasive. Thus, *Galavan* does not support a finding that plaintiff alleged a direct or reasonably foreseeable effect on United States commerce if the Court were to adopt the narrow interpretation of "conduct." (Although *Galavan* found that the court had subject matter jurisdiction, it dismissed the action because plaintiffs lacked standing due to their lack of participation in a domestic American market. 1997 WL 732498, 1997 U.S. Dist. LEXIS 18585, at *10-*13. If the Court were to follow *Galavan*, then, it would still dismiss this action.) Accordingly, if the Court were to adopt the narrow interpretation of conduct advanced by *Kruman*, dismissal for lack of subject matter jurisdiction would be required. The Court need not choose a definition of "conduct" in § 6a(1), however, because dismissal is required under § 6a(2), as set forth below.

If the Court were to adopt the broader interpretation of "conduct," plaintiff would have alleged conduct that directly and reasonably foreseeably affected domestic commerce in the United States. Under the broader interpretation, the conduct in question would consist of the entire alleged conspiracy to fix fees for exchanges of European currencies in Europe and the United States. Fixing the fees charged for exchanges of European currencies that take place in the United States would directly [*166] restrain the American market for European currency exchanges. And such a restraint would be the reasonably foreseeable effect of an agreement to fix the fees.

If a direct and reasonably foreseeable effect on United States commerce is alleged, there remains the question of whether such effect is substantial. Neither party adequately addresses this issue. Defendants simply take the position that there was no direct effect on United States commerce, and do not address the substantiality issue. (Defs.' Mem. at 9-15; Reply Mem. at 2-10.) Plaintiff relies on several cases that antedate the FTAIA for the proposition that the effect

on United States commerce need only be more than *de minimus*. (Pl.'s Mem. at 17-18.) This proposition must be rejected, as the text of § 6a clearly requires that the effect be "substantial." The Court is not aware of any case that is directly on point; cases either find no direct effect on American commerce or assume that the effect is substantial. Absent convincing indications to the contrary, the Court will assume that the effect, if direct and reasonably foreseeable, would be substantial. The Court makes such assumption because it believes that plaintiff's claim fails on the second prong of the FTAIA test, even if the Court were to adopt the broader interpretation of "conduct."

B. Section 6a(2)

As noted above, subsection (2) requires that, "such [direct, substantial, and reasonably foreseeable] effect [on United States commerce] gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section." It is clear from the text that this subsection requires the effect to be an anticompetitive effect. Any claim under the first seven sections of Title 15 requires an anticompetitive effect, a restraint of trade. 15 U.S.C. §§ 1-7; *see also* H.R. Rep. No. 97-686, at 11-12, 18 (1982) (discussing § 6a(2)'s requirement of anticompetitive effects). If there is a direct, substantial, and reasonably foreseeable effect on domestic American commerce here, it is an anticompetitive effect: the fixing of fees charged for exchanges of European currencies.

The parties disagree as to whether plaintiff's claim must arise out of this anticompetitive effect on domestic American commerce. Defendants argue that plaintiff does not comply with § 6a(2) because, even assuming he alleges the requisite effect on American commerce, plaintiff does not allege that such effect gives rise to his claim. (Defs.' Mem. at 13-15; Reply Mem. at 10-11.) Plaintiff argues that the effect need not give rise to his claim, but only to a claim. (Pl.'s Mem. at 15.) The weight of authority clearly supports defendants. *See Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001), *petition for cert. filed*, 69 U.S.L.W.

3791 (June 11, 2001); *Ferromin Int'l Trade Corp. v. UCAR Int'l, Inc.*, 153 F. Supp. 2d 700 (E.D.Pa. 2001); *Turicentro, S.A. v. American Airlines, Inc.*, 152 F. Supp. 2d 829 (E.D.Penn. 2001); *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, No. Civ. 001686TFH, 2001 WL 761360 (D.D.C. June 7, 2001); *United Phosphorus, Ltd. v. Angus Chem. Co.*, 131 F. Supp. 2d 1003 (N.D.Ill. 2001); *Kruman v. Christie's Int'l PLC*, 129 F. Supp. 2d 620 (S.D.N.Y. 2001); *In re Copper Antitrust Litig.*, 117 F. Supp. 2d 875 (W.D.Wis. 2000); *cf. In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702 (D.Md. 2001). *But see Den Norske*, 241 F.3d at 431-39 (Higginbotham, J., dissenting). Because the Court finds the majority position convincing, the Court grants a dismissal based on § 6a(2).

**[*167]** In *Den Norske*, a Norwegian oil company brought an antitrust suit in the United States District Court for the Southern District of Texas against several companies, one of which was American. The defendants were the world's sole operators of certain machinery required to build and move oil platforms. The plaintiff alleged that the defendants engaged in a bid rigging conspiracy and allocated customers among themselves. 241 F.3d at 421-22. The conspiracy was allegedly global in scope, and allegedly resulted in purchasers of the defendants' services in the Gulf of Mexico (i.e. in American waters) paying inflated prices. *Id.* at 422. The district court dismissed the action under the FTAIA and the plaintiff appealed. The Fifth Circuit majority affirmed based, at least in part, on § 6a(2). The court noted that

> [t]he dissent, like [the plaintiff], argues that Section 2 should be read to require only that the domestic effect give rise to any antitrust claim, not necessarily the plaintiff's claim. This interpretation contradicts the explicit intent of Congress to require that the effect must give rise to the particular injury claimed by the plaintiff in the suit:
>
> ... [T]he full committee added language to the Sherman and FTC Act amendments to require that

> the 'effect' providing the jurisdictional nexus *must also be the basis for the injury alleged under the antitrust laws.*

H.R. Rep. No. 97-686, at 12 (emphasis added).

241 F.3d at 426 n. 19 (emphasis in the original). Because inflated prices paid by American companies for defendants' services in the Gulf of Mexico did not give rise to the plaintiff's claim for inflated prices paid for defendants' services in the North Sea, the district court lacked subject matter jurisdiction over the action. *Id.* at 427. Although the court recognized the relationship between the inflated prices in the two locations, "the FTAIA requires more than a 'close relationship' between the domestic injury and the plaintiff's claim; it demands that the domestic effect 'gives rise' to the claim." *Id.*

A similar result was reached in *In re Copper Antitrust Litigation.* In that action, plaintiffs who had purchased copper futures on the London Metal Exchange sued the defendants for an alleged conspiracy to manipulate the London Metal Exchange in order to artificially inflate the price of copper. 117 F. Supp. 2d at 876. The court found that there was a direct, substantial, and reasonably foreseeable effect on the United States copper market. *Id.* at 879. However, the district court found that subsection (2) of the FTAIA was not satisfied. The court asserted that the "most natural way of reading [section 6a] is that antitrust laws do not apply unless the effects are the same. In other words, the Sherman Act claim that a plaintiff alleges and the Sherman Act claim that arises out of the effect on an American market must be the same." *Id.* at 882 (emphasis in the original). The court expressly rejected plaintiff's argument that the effect on United States commerce need only give rise to some claim. The court also rejected the argument advanced by plaintiff (and later by the *Den Norske* dissent) that requiring that plaintiff's claim arise out of the effect on American commerce would make the final proviso of § 6 redundant. *Id.* at 884. The court then considered the legislative history of the FTAIA, concluding that "[n]othing in this history

suggests that Congress intended that the scope of recovery would extend to persons injured overseas by effects other than those felt by American markets." *Id.* at 885.

[*168] Plaintiff contends (and the court in *In re Microsoft Corp. Antitrust Litigation* asserted, 127 F. Supp. 2d at 716) that the holding in *In re Copper* depended upon the fact that the plaintiffs there had purchased copper futures, whereas the effect on domestic commerce was the inflation of prices on the American market for copper itself. The Court believes that this is a misreading, and that *In re Copper* and *Den Norske* (in which both the domestic and foreign markets for "heavy-lift barges" were affected) are consistent on this point. First, the *In re Copper* Court never stated that its holding depended on any such distinction. Second, the language quoted above is inconsistent with such a position. The court did not state that the effects suffered by the plaintiff and the effects on the United States market needed to be parallel; it stated that those two effects needed to be one and the same. Consider also the following passage:

> Defendants do not dispute the assertion that Congress intended to preserve Sherman Act jurisdiction for a foreign person injured by conduct that causes the requisite effects in the United States, even if that person suffers economic injury abroad, so long as the overseas injury is the result of *effects on an American market.* If persons conspire to fix prices in a way intended to affect an American market, the domestic antitrust laws will apply to a suit by a person injured by the price-fixing even if the person is located overseas. *On the other hand, the antitrust laws do not apply to an action by a person injured overseas because of price-fixing in a foreign market even if the same defendants engage in price-fixing affecting an American market.*

*Id.* at 885 (emphasis added).

The other cases cited by defendants employ reasoning similar to *Den Norske* and *In re Copper* to arrive at the same result. For example, in *Kruman* the court ruled that

"the FTAIA permits suit ... only where the conduct complained of had 'direct, substantial and reasonably foreseeable effects' in the United States and the effects giving rise to jurisdiction also are the basis for the alleged injury." 129 F. Supp. 2d at 625 (footnote omitted). The court observed in a footnote that the legislative history "make[s] clear that purchasers in entirely foreign transactions who do not suffer from any lessening of competition within the United States have no claim." *Id.* at 625 n. 15. Plaintiff criticizes *Kruman* as improperly relying on issues of market definition and market power even though the plaintiffs alleged a *per se* violation. (Pl.'s Mem. at 21-22.) The Court does not agree that the *Kruman* decision relies upon issues of market definition and market power, except to the extent that *Kruman* relies upon the FTAIA's distinction between American markets and foreign markets.

In *Ferromin*, the court dismissed a complaint alleging a global conspiracy to fix the price of graphite electrodes because the plaintiffs had purchased electrodes only outside the United States. The court concluded, based on the text of the FTAIA and the cases construing it, that to establish subject matter jurisdiction under the FTAIA a plaintiff must show that its injuries were caused by an anticompetitive effect on a United States market. 153 F. Supp. 2d at 703-06. *Accord Turicentro*, 152 F. Supp. 2d at 833 ("plain language" of FTAIA requires that plaintiff's injury arise from effects on domestic market; controlling issue is where the effects of defendant's conduct are felt); *Empagran*, 2001 WL 761360, at *2-*3 (ruling that "the effect providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws" and dismissing [*169] action where plaintiffs did not purchase in the domestic market; allegation of global conspiracy held insufficient to establish jurisdiction); *United Phosphorus*, 131 F. Supp. 2d at 1009, 1013-14, 1018-20 (no subject matter where, among other things, plaintiffs' injury did not arise out of effects on domestic market).

In *In re Microsoft*, after considering the language and legislative history of the FTAIA, the court concluded that,

"[t]he critical question is not the nationality of the plaintiff but the location of the marketplace in which he participated." 127 F. Supp. 2d at 716. Later the court altered course and stated that, "section 6a itself does not tie subject matter jurisdiction to the situs of the market in which the plaintiff participated." *Id.* Then, citing *Galavan*, the court dismissed for lack of standing. *Id.* The court concluded its discussion of the issue by stating that, "[i]n any event, whether the issue is resolved as one of jurisdiction or one of standing, the result is the same. I hold that a plaintiff who has not participated in the U.S. domestic market may not bring a Sherman Act claim under the FTAIA." *Id.* The Court agrees with the ultimate conclusion of the *In re Microsoft* court to the effect that the key jurisdictional issue under § 6a(2) is whether a plaintiff participated in the affected American market.

In opposition to the majority position, plaintiff relies upon the *Den Norske* dissent, which is not persuasive, and upon cases that are inapposite. For example, plaintiff relies upon *Caribbean Broadcasting*, a case which did not acknowledge the existence of subsection (2). 148 F.3d at 1085-87; *see also In re Copper Antitrust Litigation*, 117 F. Supp. 2d at 875 (distinguishing *Caribbean Broadcasting* based on its ignoring subsection (2).) Plaintiff also relies upon *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993), and *Pfizer, Inc. v. India*, 434 U.S. 308, 98 S. Ct. 584, 54 L. Ed. 2d 563 (1978). In *Hartford Fire*, plaintiffs sued insurers and reinsurers located in the United States and abroad over an alleged conspiracy "to restrict the terms of coverage of commercial general liability (CGL) insurance available in the United States." 509 U.S. at 770, 113 S. Ct. 2891 (footnotes omitted). The plaintiffs were thus alleging that their injuries arose out of a restraint on domestic commerce; subsection (2) was obviously satisfied. *See id.* at 770-779, 113 S. Ct. 2891. Moreover, the Supreme Court chose not to confront any FTAIA issues, opting instead to simply assume that the statute was satisfied. *Id.* at 796 n. 23, 113 S. Ct. 2891. As for *Pfizer*, that case predates the FTAIA by four years. It cannot be relied upon as authority

for interpreting § 6a. In addition, the principal question in *Pfizer* was whether foreign nations were "persons" within the meaning of 15 U.S.C. § 15, 434 U.S. at 311, 98 S. Ct. 584, and the Supreme Court held "only that a foreign nation otherwise entitled to sue in our courts is entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff." *Id.* at 320, 98 S. Ct. 584. Furthermore, the foreign governments in *Pfizer* apparently participated in the domestic American markets. *See* 434 U.S. at 590, 98 S. Ct. 873 ("When a foreign nation enters our commercial markets as a purchaser of goods . . . ."); *see also* H.R. Rep. 97-686, at 10 (citing *Pfizer* for the proposition that "[f]oreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace" even if they feel abroad the injurious effects of a domestic restraint of trade). Accordingly, Pfizer is distinguishable from this action.

Plaintiff also directs the Court's attention to *In re Vitamins Antitrust Litigation*, No. 99-197TFH, 2001 WL 755852 (D.D.C. June 7, 2001). (Letter from Barbara [*170] J. Hart to the Court dated July 24, 2001.) In that action, the court denied a motion to dismiss under the FTAIA because the plaintiffs had made purchases in the domestic American market and because the plaintiffs were subsidiaries of American companies. 2001 WL 755852, at *2. That action is distinguishable to the extent that the plaintiffs therein made purchases in the domestic American market. To the extent the court's holding relied upon an effect on the finances of the plaintiffs' American parent companies, this Court respectfully takes a different view than that of the *In re Vitamins* court. *See* H.R. Rep. 97-686, at 9-10 (stating that a transaction between foreign firms is not within the scope of American antitrust laws merely because the foreign firms are American-owned; requirements of § 6a must be met for American law to apply).

After consideration of the FTAIA, the legislative history of the FTAIA, and the cases construing the statute and its legislative history, the Court finds plaintiff's argument unpersuasive, and adopts the majority interpretation of sub-

section (2) for the reasons set forth in the majority cases. Whether or not the Court considers the statement by plaintiff's counsel that plaintiff only exchanged currency in Europe, the majority interpretation of subsection (2) requires dismissal. Under that interpretation, plaintiff must allege that his claim, his injury, arose out of a direct, substantial, and reasonably foreseeable anticompetitive effect on domestic American commerce (import and export commerce being irrelevant to this action). Plaintiff does not, and apparently cannot, allege that his claim arose out of any effect on domestic American commerce. Accordingly, plaintiff fails to satisfy subsection (2) of 15 U.S.C. § 6a, and so does not meet his burden of demonstrating subject matter jurisdiction. The Court therefore grants defendants' Rule 12(b)(1) motions and dismisses the instant action.

## IV. CONCLUSION

For the reasons set forth above, the defendants' motions to dismiss for lack of subject matter jurisdiction are granted. Accordingly, defendants' motions to dismiss for failure to state a claim and for lack of personal jurisdiction are denied, without prejudice, as moot. The Clerk of the Court is directed to close the file in this action.

SO ORDERED.

(3)

Supreme Court, U.S.
FILED
MAR 15 2004

No. 03-1015

IN THE

# Supreme Court of the United States

BANK AUSTRIA AG, *et al.*,

*Petitioners,*

*v.*

JOHN L. SNIADO, III,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

In the decision below, the Second Circuit held that the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a, does not prohibit antitrust claims by foreign purchasers where the alleged anticompetitive behavior has a direct, substantial and reasonably foreseeable effect on United States commerce. The question presented is as follows:

Does the Foreign Trade Antitrust Improvements Act preclude an antitrust action in which a plaintiff was injured abroad as a result of defendants' unlawful international conspiracy, where the anticompetitive behavior is alleged to have a direct, substantial and reasonably foreseeable effect on United States Commerce?

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**STATUTES**

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Respondent John L. Sniado, III respectfully requests that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit be denied.

## INTRODUCTION

Petitioners seek review of the Second Circuit's holding that the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a, does not bar a claim against parties to an international conspiracy under the federal antitrust laws, for injuries sustained in international commerce. This Court has already granted certiorari in a similar case, *F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 315 F.3d 388 (D.C. Cir. 2003), *cert. granted*, __U.S.__, 124 S. Ct. 966 (2003). Respondent respectfully submits that certiorari should be denied in this case, and the case should proceed on remand, as the Second Circuit ordered. Granting certiorari and staying this case, as Petitioners request, will significantly delay its progress. This case should proceed, and Petitioners' request should be denied, because a stay will not contribute to or shape the outcome of the issue under consideration in *Empagran*.

### A. Factual Background

In this action, Plaintiff-Respondent John L. Sniado, III alleges that Defendant-Petitioners and other unnamed parties engaged in a decades-long, worldwide conspiracy to fix the fees charged by Petitioners for the exchange of a number of European currencies. This conspiracy was the subject of an investigation by the European Commission's antitrust authority, and by Italian banking authorities, spanning several years, and leading to multi-million dollar fines. The Amended

Complaint sets forth allegations establishing a horizontal price-fixing conspiracy by Petitioners, which is a *per se* violation of the Sherman Act, 15 U.S.C. § 1.

Respondent submits that a grant of certiorari is not warranted, because this case will benefit from further development, and the request for a stay would serve only to delay further the proceedings in this case. Indeed, Petitioners do not ask the Court to review this case, but only to hold it in abeyance pending the Court's decision in *Empagran*. The grant of certiorari will prevent Respondent from seeking discovery, and from proceeding on issues pertaining to standing and subject matter jurisdiction that the Second Circuit expressly instructed the district court to address on remand. If certiorari is denied, the parties will have the opportunity, as ordered by the Second Circuit, to develop the record further as to the nature and scope of the conspiracy, and how it injured Plaintiff and the Class. Depending on the outcome of the additional proceedings below, the Court may then choose to review the case on this more developed record.

Thus, the petition for review here should be denied. The grant of certiorari to hold this case, as Petitioners request, will not enhance or improve the analysis undertaken in *Empagran*. While the issue concerning the interpretation of the FTAIA under review in *Empagran* is of great importance, the continued litigation of this case in the lower court to flesh out, *inter alia*, the underlying jurisdictional and related facts, will only benefit the parties and the Court in the event subsequent review by this Court should be sought.

## B. Procedural History

### 1. Proceedings in the District Court

On November 30, 2000, Respondent Sniado filed a complaint under Section 1 of the Sherman Act, on behalf of a putative class (the "Class") comprising all persons and businesses in the United States that paid supra-competitive fees for the exchange of European currencies, as a result of Defendants' international price-fixing conspiracy. (JA 16)[1] Respondent filed an Amended Complaint in April 2001.

In their motions to dismiss, Petitioners submitted affidavits disputing the factual allegations in the Amended Complaint. Because Petitioners challenged, *inter alia*, the sufficiency of Respondent's allegations with respect to Petitioners' conduct, Respondent also filed, as part of his opposition papers, an affidavit sworn to by Bernard Persky (the "Persky Affidavit"). The Persky Affidavit annexed a series of exhibits in support of Respondent's contention that Petitioners had engaged in antitrust violations that vested the district court with subject matter jurisdiction over Respondent's claims. (JA 173-201) On November 29, 2001, the District Court granted Petitioners' Motion to Dismiss, reported at 174 F. Supp. 2d 159.

### 2. The *Kruman* Decision

On March 13, 2002, while appeal of this case was pending before the Second Circuit, that court issued its decision in *Kruman v. Christie's Int'l, PLC*, 284 F.3d 384

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1. Respondent cites to the Joint Appendix, submitted to the Second Circuit in this case, and available to this Court on request.

(2d Cir. 2002), *petition for cert. dismissed*, __U.S.__, 124 S. Ct. 27 (2003). The Court of Appeals concluded that plaintiffs who alleged that they paid inflated commissions to defendants, at auctions held outside the United States, had stated a claim under the antitrust laws. "[B]ecause the plaintiffs' complaint describes conduct that has the requisite 'effect' on domestic commerce under the FTAIA to be regulated by the Sherman Act, we vacate the district court's judgment granting the defendants' motion to dismiss and remand the case for further proceedings consistent with this opinion." *Id.* at 390.

The *Kruman* court examined the legislative history of the FTAIA, finding that its intent was not to limit the parties who could sue — nor was it to protect defendants from liability for the foreign effects of their anticompetitive behavior — but to protect United States exporters from liability under the antitrust laws. *See id.* at 396. Indeed, this Court has recognized the principle underlying the FTAIA is not to bar claims by plaintiffs injured in foreign commerce: "FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796-97 n.23 (1993) (citation omitted).[2]

2. The weight of authority is indeed supportive of this reading. *See Metallgesellschaft AG v. Sumitomo Corp. of America*, 325 F.3d 836, 840-41 (7th Cir. 2003) (reserving judgment on the proper reading of § 6a(2), but indicating that circuit precedent "appears to point in the direction of the approach taken by the D.C. and Second Circuits" in *Empagran* and *Kruman*). As Judge Higginbotham states in his dissent in *Den Norske Stats Oljeselskap AS v. Heeremac vof*, 241 F.3d 420 (5th Cir. 2001) (Higginbotham, J., dissenting):

> Every single congressional finding [in the legislative history of the FTAIA] relates to the importance of export

(Cont'd)

### 3. Proceedings in the Second Circuit

Respondent filed his notice of appeal of the district court's judgment on January 9, 2002. After briefing and oral argument, the Second Circuit vacated the district court's judgment, and remanded the case for further proceedings. The court followed its recent holding in *Kruman*, that "the 'plain meaning' of the statute precluded the construction of § 6a(2) advanced by the defendants and adopted by the district court in this case," and thus required that the effect of defendants' conduct need ónly give rise to "a claim" under the antitrust laws, not to plaintiff's specific claim. *Sniado v. Bank Austria AG*, 352 F.3d 73, 78 (2d Cir. 2003). The Second Circuit instructed the district court to consider other related issues, including antitrust standing, on remand. The Second Circuit referenced its adoption in *Kruman* of a broad reading of "conduct," in Section 6a(1) of the FTAIA, as "acts that are illegal under the Sherman Act," not just those specific acts causing the plaintiff's injury. *Id.* (quoting *Kruman*, 284 F.3d at 398-99). The court also noted that the district court had remarked on the issue of standing only in *dicta*. While acknowledging that it had discretion to consider antitrust standing on appeal, the Court of Appeals instead remanded the case expressly for determination of the standing issue in the first instance. *See id.* at 79. Last, the court granted

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(Cont'd)

> business and the need to encourage export activity by American business. . . It could not be clearer that the FTAIA serves to exempt exporting from antitrust scrutiny, not to limit the liability of participants in transnational conspiracies that affect United States commerce.

*Id.* at 433.

Respondent permission to file a motion for leave to replead, pursuant to Fed. R. Civ. P. 15(a).

## STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Section 4 of the Clayton Act, 15 U.S.C. § 15(a), provides in pertinent part:

> Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a, provides:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

## STATEMENT

Respondent John L. Sniado, III alleges that he was injured as a result of Petitioners' conspiracy to fix fees on the exchange of European currencies. The Amended Complaint states claims under Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 4 of the Clayton Act, 15 U.S.C. § 15. It alleges that as a result of Defendants' illegal conduct, Sniado and members of the Class paid supra-competitive

exchange fees in the United States and Europe, thereby suffering injury to their business or property. The Class includes all persons and businesses in the United States that have paid supra-competitive foreign exchange fees for European currencies that now constitute the Euro, pursuant to the price-fixing conspiracy. The exact starting date of the class period is at this point unknown, beginning in the 1980s and continuing to the present.

As discussed above, the Court of Appeals for the Second Circuit vacated the dismissal of the Amended Complaint, largely on the basis of its previous holding in *Kruman v. Christie's Int'l, PLC*, 284 F.3d 384 (2d Cir. 2002), *petition for cert. dismissed*, __U.S.__, 124 S. Ct. 27 (2003), that the plain language of Subsection 6a(2) of the FTAIA requires that defendants' alleged behavior give rise to "a claim" under the antitrust laws, not *the* plaintiff's claim. *See Sniado*, 352 F.3d at 77-78; *Kruman*, 284 F.3d at 396. The Court of Appeals further instructed that the district court should address the sufficiency of the allegations under Subsection 6a(1) of the FTAIA, and the issue of whether Respondent had standing to sue under the antitrust laws. It also granted Respondent permission to file a motion seeking to replead pursuant to Fed. R. Civ. P. 15(a). *See* 352 F.3d at 78-79.

While the extent to which Respondent and members of the Class have been injured has yet to be determined through discovery, the fact that they allege sufficient antitrust injury is manifest. As stated in the Amended Complaint, the European Union and the United States are the two largest economies in the world, who together account for about half the entire world economy. The United States and European Union have the biggest bilateral trading and investment relationship in the world, with transatlantic flows of trade

and investment amounting to around $1 billion per day. Tourists from the United States traveling to European Union nations have accounted for a large portion of the tourists visiting the European Union, and a substantial portion of the travelers and enterprises adversely affected by the unlawful activities alleged herein are United States persons and businesses. Respondent has alleged that United States persons and businesses exchanging Euro-zone currencies for each other paid the supra-competitive fees set by Petitioners through their conspiracy. (JA 164-65) Respondent requested and should have had the opportunity to show this and other aspects of how the international conspiracy affected U.S. purchasers, and how it gave rise to claims by the class under the antitrust laws.

Additional proceedings in the district court on remand will lead to a fuller development of the allegations in this case, which has not yet reached the discovery phase. Indeed, the Court could deny certiorari now and consider reviewing the case when the record is more fully developed. *See Hughes Tool Co. v. TransWorld Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973) (dismissal of prior grant of certiorari, stating that this did not foreclose later consideration of the issue); *see also Brady v. Terminal R. Ass'n of St. Louis*, 302 U.S. 688, 678 (1937). Further development of the record in this case will likely help to develop more fully the issues in this case as it relates to the reach of the FTAIA, while review now will only present the FTAIA-related issues in a piecemeal, incomplete fashion.

## REASONS FOR DENYING THE PETITION

### I. This Case Should Proceed So That The District Court Can Determine the Sufficiency of the Pleadings, Respondent's Antitrust Standing, and the Domestic Economic Effects of the International Conspiracy.

The district court dismissed Respondent's claims pursuant to FTAIA § 6a(2), and it decided that it need not reach a determination of the sufficiency of the allegations under § 6a(1), which requires that a defendant's conduct have a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. In reversing that decision, the Second Circuit remanded with a direction to the district court to follow its holding in *Kruman*, which applied a broad interpretation of "conduct." The district court had raised several questions about whether the Amended Complaint sufficiently alleged a direct, substantial and reasonably foreseeable effect on domestic commerce, as required by § 6a(1). *See* 174 F. Supp. 2d at 163-66. The parties will have the opportunity on remand to brief this issue, and the district court can issue a ruling on a fuller record.

### II. Antitrust Standing Is Not A Question Warranting Supreme Court Review.

Petitioners contend that purchasers who have been injured only in foreign commerce do not have standing to pursue antitrust damages in United States courts. [Pet. Br. at 12] This argument is merely duplicative of Petitioners' FTAIA argument.

The more appropriate standing inquiry, as explained by the Second Circuit, is whether Respondent has sufficiently

alleged antitrust injury as a result of the alleged conspiracy, pursuant to Section 4 of the Clayton Act. The parties can litigate this important issue on remand. Because there is no conflict between the circuits as to the law of standing, Supreme Court review of that question is therefore not warranted here. In *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), this Court explicated the factors to be considered in determining whether a person was injured within the meaning of Section 4 of the Clayton Act: (1) the causal connection between violation and harm; (2) whether the harm was intended; (3) the nature of the injury; (4) whether the plaintiff was a consumer or competitor; (5) the directness of the injury; (6) the speculative nature of the damages; (7) the potential for duplicative recovery and the existence of more direct plaintiffs; and (8) the complexity of the apportionment of damages. *See id.* at 537-44. Respondent submits that this is a classic case of horizontal price-fixing, involving a *per se* violation of the antitrust laws, for which directly affected consumers have standing to recover under the *Associated General Contractors* standing test. However, the district court can explore this question further on remand.

In support of his standing argument, Respondent alleges that he paid supracompetitive exchange fees as a result of an international price-fixing cartel. This is a classic *per se* violation of Section 1 of the Sherman Act, and Respondent thus has suffered antitrust injury. *See Reiter v. Sonotone*, 442 U.S. 330, 337-45 (1979) (holding that consumers who pay higher price for goods as a result of antitrust violations sustained injury to their property and thus had standing to bring suit). Thus Respondent is a proper party to bring suit, and there is no need to grant certiorari on this issue.

## CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 03-1015

IN THE

# Supreme Court of the United States

BANK AUSTRIA AG, ET AL.,
*Petitioners,*

*v.*

JOHN L. SNIADO, III, ET AL.,
*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

# Supreme Court of the United States

No. 03-1015

BANK AUSTRIA AG, ET AL.,
*Petitioner,*

*v.*

JOHN L. SNIADO, III, ET AL.,
*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

For the proper disposition of this petition, the Court need look no further than the question presented as it has been framed by respondent: "Does the Foreign Trade Antitrust Improvements Act preclude an antitrust action in which a plaintiff was injured *abroad* as a result of defendants' unlawful international conspiracy, where the anticompetitive behavior is alleged to have a direct, substantial and reasonably foreseeable effect on United States Commerce?" (Opp. i.) (emphasis added). This is essentially the same question that the Court will resolve in *F. Hoffmann-La Roche Ltd.* v. *Empagran, S.A.*, No. 03-724 (cert. granted Dec. 15, 2003). There should be no dispute that the present petition for certiorari should be held until the Court decides in *Empagran* whether a plaintiff may pursue a Sherman Act claim for injuries sustained in transactions occurring entirely outside United States commerce.

Respondent nonetheless makes two arguments to try to prevent the Court from holding this petition. He asserts that (1) additional proceedings in the district court will help develop the record, particularly on the issue of whether the alleged foreign conspiracy had a "direct, substantial, and reasonably foreseeable effect" on United States commerce, as required by the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a (Opp. 10); and (2) "antitrust standing is not a question warranting Supreme Court review" (*id.*). Neither of these arguments has merit.

*First*, whether respondent can develop the record about the alleged conspiracy's effect on United States commerce through additional discovery is simply irrelevant at this point. The dispositive legal issue in the Second Circuit opinion was whether respondent could seek redress for alleged antitrust injuries sustained in transactions that occurred entirely in Europe, merely because the alleged anticompetitive behavior might have injured *someone else* in the United States. That is also the core issue in *Empagran*. The court of appeals assumed for purposes of its decision that respondent would be able to prove that the alleged anticompetitive conduct had some effect on someone in the United States, though not respondent himself. If the Court rules in *Empagran* that an antitrust plaintiff such as respondent must show that the conspiracy injured him—and not someone else—in domestic commerce, then respondent's claim will have to be dismissed regardless of whether the alleged conspiracy had an effect on United States commerce. There is simply no need to develop the record in the district court before the Court announces its decision and determines whether respondent has any possible legal basis on which to proceed with his suit. Moreover, the international discovery sought by respondent would be a massive waste of judicial resources, time, and money if the *Empagran* decision establishes that respondent's claim is barred in the first instance.[1]

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[1] Respondent misleadingly implies that the district court considered affidavits attached to the parties' motions in granting petitioners' motion to dismiss. Opp. 3. That is false: the district court's opinion relied solely

*Second*, the question whether a person in the respondent's position has antitrust standing is already before the Court. The *Empagran* petitioners raised in their petition for certiorari the issue of whether plaintiffs injured abroad have standing to sue under the Sherman Act, 03-274 Pet. for Cert. 20-21, and that petition was granted. Further, respondent does not explain why the district court should devote its resources to duplicating the Court's efforts at resolving this question. Petitioners submit that the better course would be for the Court to hold the petition so that the district court (and the Second Circuit) may apply the principles that will be announced by the Court in *Empagran*.

The bottom line is that nothing in the Respondent's opposition brief provides any legitimate reason for the Court not to hold the petition pending the outcome of *Empagran*. That case will decide critical issues that are potentially dispositive of the respondent's claim, and further proceedings below should be deferred until the announcement of the Court's opinion in *Empagran*, which may render further proceedings pointless.

## CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *F. Hoffmann-La Roche Ltd.* v. *Empagran, S.A.*, No. 03-724 (cert. granted Dec. 15, 2003), and then the judgment of the court of appeals should be vacated and remanded to the Second Circuit for further proceedings in accordance with the Court's opinion in that case.

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on the allegations in the complaint, and on respondent counsel's admission during oral argument that respondent had exchanged currencies in Europe, but not in the United States. Pet. App. 10a.

Respectfully submitted,

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